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THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LARRY I. NEWKIRK and) No.: _____
RUTH A. NEWKIRK)
Plaintiffs,) COMPLAINT AND
) DEMAND FOR TRIAL BY
v.) JURY
CONAGRA FOODS, INC.,)
a Delaware Corporation)
and)
SHOPKO STORES, INC.,)
a Wisconsin Corporation)
and)
SHOPKO STORES OPERATING CO., LLC,)
a Delaware Corporation)
and)
SHOPKO PROPERTIES, LLC,)
a Minnesota Corporation)
and)

1 **BUSH BOAKE ALLEN, INC.,**)
 2 **a Virginia Corporation**)
 3 **and**)
 4 **INTERNATIONAL FLAVORS &**)
 5 **FRAGRANCES, INC.,**)
 6 **a New York Corporation**)
 7 **and**)
 8 **GIVAUDAN FLAVORS CORPORATION,**)
 9 **a Delaware Corporation, formerly known**)
 10 **as Givaudan-Roure Corp., and also as**)
 11 **Givaudan-Roure Flavors Corporation**)
 12 **and also formerly known as Tastemaker**)
 13 **Corporation and also as Fries & Fries,**)
 14 **Inc. and also as Mallinckrodt Foods &**)
 15 **Flavors, Inc. and also as Mallinckrodt**)
 16 **Flavor & Fragrances, Inc. and as a**)
 17 **partner in the partnership Tastemaker**)
 18 **and**)
 19 **SYMRISE, INC.,**)
 20 **a New Jersey Corporation**)
 21 **and**)
 22 **JOHN DOE DEFENDANTS 1-20,**)
 23 **Defendants.**)

19 COME NOW Plaintiffs, and for their causes of action against Defendants
 20 ConAgra Foods, Inc., Shopko Stores, Inc., Shopko Stores Operating Co., LLC,
 21 Shopko Properties, LLC, Bush Boake Allen, Inc., International Flavors & Fragrances,
 22 Inc., Givaudan Flavors Corporation, Symrise, Inc. and John Doe Defendants 1-20,
 23 state and allege:

24 **NATURE OF THE CASE/PARTIES**

25 1. Plaintiff Larry Newkirk brings this cause of action to recover for
 26 personal injuries suffered as a direct and proximate result of his use of (preparing and
 27 consuming) microwave popcorn designed, developed, manufactured, tested,
 28

1 packaged, promoted, marketed, distributed, labeled and/or sold by the various
2 Defendants named herein, his exposure to dangerous butter flavoring products as a
3 direct result of that use and his resulting serious and permanent lung illness and
4 disease. Plaintiff Newkirk was first diagnosed with a lung condition caused by his
5 use of and exposure to microwave popcorn containing butter flavoring, as described
6 herein, in August of 2008.

7 2. Plaintiff Ruth Newkirk is Larry Newkirk's spouse and brings this action
8 for her loss of consortium as a direct and proximate result of Larry Newkirk's illness
9 and disease.

10 3. The Plaintiffs reside at North 303 McDonald Road, Spokane Valley,
11 Washington 99216.

12 4. Defendant ConAgra Foods, Inc. (ConAgra) is a Delaware corporation
13 whose principal place of business is One ConAgra Drive, Omaha, Nebraska 68102.
14 Defendant ConAgra designs, develops, manufactures, tests, packages, promotes,
15 markets, distributes, labels and sells microwave popcorn, including specifically
16 microwave popcorn containing dangerous butter flavoring products sold under the
17 brand name or label "Act II" to consumers in the State of Washington including
18 Plaintiff Larry Newkirk.

19 5. Defendants Shopko Stores, Inc., Shopko Stores Operating Co., LLC and
20 Shopko Properties, LLC (collectively "Shopko") are Wisconsin, Delaware and
21 Minnesota corporations respectively whose principal places of business are 700
22 Pilgrim Way, Green Bay, Wisconsin 54304. At all times material hereto, either
23 Shopko individually or collectively, conducted business selling products in
24 Washington, at among other places, the Shopko located at East 13414 Sprague
25 Avenue, Spokane, Washington 99216. Plaintiffs regularly shopped at Shopko and
26 purchased microwave popcorn containing dangerous butter flavoring products.

1 6. Defendant Bush Boake Allen, Inc. (BBA) is a Virginia corporation
2 whose principal place of business is 521 W. 57th St., New York, New York 10019.
3 Defendant BBA manufactured and designed butter flavors that were sold and
4 distributed to ConAgra for use in Act II microwave popcorn.

5 7. Defendant International Flavors & Fragrances, Inc. (IFF) is a New York
6 corporation whose principal place of business is 521 W. 57th St., New York, New
7 York 10019. Defendant IFF manufactured and designed butter flavors that were sold
8 and distributed to ConAgra for use in Act II microwave popcorn.

9 8. At all pertinent times, Defendants BBA and/or IFF designed,
10 manufactured, processed, marketed and/or distributed natural and artificial butter
11 flavorings. In the year 2000, Defendant IFF merged with Defendant BBA. In this
12 transaction: (1) Defendant IFF expressly or impliedly agreed to assume Defendant
13 BBA's liabilities and debts, (2) the transaction amounted to a merger of the
14 corporations, and (3) Defendant IFF is merely a continuation of Defendant BBA.

15 9. Defendant Givaudan Flavors Corporation is a Delaware corporation
16 principally located in Cincinnati, Ohio. Defendant Givaudan manufactured and
17 designed butter flavors that were sold and distributed to ConAgra for use in Act II
18 microwave popcorn.

19 10. Defendant Givaudan Flavors Corporation is the owner and operator of
20 a flavoring plant in Cincinnati, Ohio. Defendant Givaudan was known as Fries &
21 Fries, Inc. until 1992 when it began doing business as Tastemaker Corp. In June
22 1997, the entity changed its name to Givaudan-Roure Flavors Corporation and in
23 2000 the name was changed again to Givaudan Flavors Corporation, its current name.
24 The corporate entity Givaudan was a general partner in a partnership called
25 Tastemaker that operated the plant between 1992 and 1997. (Collectively these
26 various entities are all "Givaudan")
27
28

1 11. Defendant Symrise, Inc. is a New Jersey corporation whose principal
2 place of business is Teterboro, New Jersey. Symrise is the name of the entity created
3 in 2002 after the merger of Dragoco and Haarmann & Reimer. Defendant Symrise
4 manufactured and designed butter flavors that were sold and distributed to ConAgra
5 for use in Act II microwave popcorn.

6 12. “Act II Butter” and “Act II Butter Lovers” were, upon information and
7 belief, made between 1989 and 2007 by ConAgra.

8 13. “Act II Butter” and “Act II Butter Lovers” microwave popcorn contained
9 butter flavors which were designed and manufactured for and sold to ConAgra by
10 Defendants Givaudan, Symrise, BBA, IFF, and John Doe Defendants 1 - 20.

11 14. At all times pertinent, the true names and addresses of John Doe
12 Defendants 1 - 20 have been and remain unknown despite Plaintiffs’ attempts to
13 discover their names and addresses. It is known that the John Doe Defendants are
14 individuals, partnerships and/or corporations who are or were engaged in the business
15 of designing, manufacturing, and/or selling microwave popcorn, butter flavoring used
16 in such microwave popcorn and flavoring chemicals used in that butter flavoring to
17 which Plaintiff Larry Newkirk was exposed.

18 15. Plaintiffs seek judgment against the Defendants, and each of them, for
19 compensatory damages caused by Defendants’ negligent design, development,
20 manufacture, testing, packaging, promotion, marketing, distribution, labeling and/or
21 sale of defective microwave popcorn, including natural and artificial butter flavorings
22 and Defendants’ failure to warn of the dangers thereto.

23 **JURISDICTION AND VENUE**

24 16. Jurisdiction exists pursuant to 28 U.S.C. § 1332. Venue is proper in this
25 Court pursuant to 28 U.S.C. § 1391(a).

26 17. The amount in controversy, exclusive of interest and costs, exceeds
27 Seventy-Five Thousand Dollars (\$75,000.00).

GENERAL ALLEGATIONS

18. Whenever reference in this Complaint is made to any act or transaction by a Defendant, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents and/or representatives of such Defendant committed, knew of, performed, authorized, ratified and/or directed such act or transaction on behalf of such defendant while actively engaged in the scope of his or her duties.

19. At all pertinent times, the Defendants designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled and/or sold microwave popcorn containing natural and/or artificial butter flavorings. The microwave popcorn containing butter flavor was intended by Defendants to have a butter aroma and taste.

20. Defendants' microwave popcorn made with natural and artificial butter flavorings made with, at all times material hereto, the compound diacetyl and other compounds that volatilize during the preparation and use of the oil and flavor mixture during the microwave popcorn packaging process and during the preparation of the popcorn by consumers by cooking the popcorn in a microwave oven.

21. Exposure to these flavoring compounds causes damage to the respiratory system in the form of asthma, bronchiectasis, bronchiolitis obliterans, chronic bronchiolitis, chronic obstructive bronchitis, chronic cough, chronic obstructive pulmonary disease, emphysema, fatigue, obstructive spirometry abnormalities, severe lung impairment, shortness of breath and/or other respiratory illnesses and diseases.

22. The Defendants knew or should have known of the hazardous nature of their natural and artificial butter flavorings and microwave popcorn containing them at the time of manufacture and/or sale and while Plaintiffs purchased, prepared and consumed their products. Defendants, and each of them, failed to warn that preparing microwave popcorn in a microwave oven as intended and smelling the buttery aroma could expose the consumer to an inhalation hazard and a risk of lung injury. All

1 Defendants failed to give instructions regarding the safe use of and necessity of
2 precautions around microwave popcorn and butter flavoring. As a direct result of this
3 failure to warn and failure to give proper instructions, Plaintiffs did not know of or
4 appreciate the hazard posed by microwave popcorn with butter flavoring.

5 23. Beginning in or around 1989 and continuing into September 2007,
6 Plaintiffs regularly purchased microwave popcorn from Shopko located at East 13414
7 Sprague Avenue, Spokane, Washington 99216, including specifically, but not limited
8 to, microwave popcorn sold under the label "Act II Butter" or "Act II Butter Lovers."
9 Plaintiff Larry Newkirk regularly prepared four to six bags of microwave popcorn
10 each day during this time period.

11 24. In the course of cooking the microwave popcorn in his microwave and
12 preparing to eat it, Plaintiff Larry Newkirk was exposed to the butter flavoring as it
13 became heated and vaporized.

14 25. Plaintiff Larry Newkirk's exposure to Defendants' popcorn and natural
15 and artificial butter flavorings directly and proximately caused personal injury, i.e.,
16 the development of sustained, severe, permanent, and/or progressive damage to the
17 lungs, severe damage to the respiratory system, and/or impairment of the ability to
18 function, including, but not limited to: bronchiolitis obliterans, severe and progressive
19 damage to the respiratory system, extreme shortness of breath and reduced life
20 expectancy. Plaintiff Larry Newkirk has further suffered and will suffer in the future,
21 pain, discomfort, mental anguish, suffering, disability, loss of enjoyment of life, fear,
22 anxiety, loss of sleep and other mental and emotional distress directly and
23 proximately caused by the conduct of the Defendants.

24 26. As a direct and proximate result of the conduct of the Defendants,
25 Plaintiffs have incurred and will incur in the future medical expenses for physicians,
26 surgeons, nurses, hospitals, x-rays and other medical treatment.

27. As a further direct and proximate result of the stated conduct of the Defendants, Plaintiffs have incurred and will incur loss of income, wages, profits and commissions, a diminishment of earning potential, lost earning capacity, future economic loss, out-of-pocket expenses and other pecuniary losses. Plaintiffs' actions pled herein are not premised upon Plaintiff Newkirk's weight gain, obesity, or a health condition associated with the Plaintiff's weight gain or obesity based on Plaintiff's consumption of food, as described in RCW 7.72.070.

COUNT I

(Negligence)

28. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-27 of this Complaint as if fully set forth above.

29. Defendants designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled and/or sold microwave popcorn and/or their butter flavorings and ingredients intended to be cooked in a microwave oven, to be tasted and to have a pleasant aroma or smell.

30. Defendants ConAgra, Shopko and John Doe Defendants 1-20's microwave popcorn contained butter flavoring including flavoring ingredients which, when used as intended, were highly likely to cause and/or be a substantial contributing factor in causing the following human illnesses, injuries and conditions:

- a. bronchiolitis obliterans,
- b. respiratory disease,
- c. severe impairment of lung function, and
- d. other types of diseases and injuries associated with butter flavorings and their constituents.

31. Defendants Givaudan, Symrise, BBA, IFF and John Doe 1-20's butter flavoring products which, when used as intended, were highly likely to cause and/or be a substantial contributing factor in causing the following human illnesses, injuries

1 and conditions:

- 2 a. bronchiolitis obliterans,
- 3 b. respiratory disease,
- 4 c. severe impairment of lung function, and
- 5 d. other types of diseases and injuries associated with butter
- 6 flavorings and their constituents.

7 32. At all times material, the ordinary consumer, including Plaintiff Larry
8 Newkirk, did not know of the likelihood of, the severity of or the extent of the risks
9 from Defendants' butter flavorings.

10 33. Defendants at all times material had and breached the following legal
11 duties to consumers including Plaintiffs:

- 12 a. the duty to warn all foreseeable users, including consumers, of
13 Defendants' microwave popcorn and/or butter flavoring products
14 of the likelihood, probability and/or foreseeability that the harms
15 listed herein would or might occur if the products were used as
16 intended;
- 17 b. the duty to acquire, maintain and apply the best scientific
18 knowledge available in the field of microwave popcorn and butter
19 flavor design, development, manufacture, testing, packaging
20 promotion, marketing, distribution, labeling and/or sale of
21 microwave popcorn and/or their butter flavorings;
- 22 c. the duty to test, design, manufacture and sell microwave popcorn
23 and butter flavorings that when used as intended were reasonably
24 safe for all foreseeable users and consumers such as Plaintiffs;
- 25 d. the duty to make feasible improvements in design, composition,
26 or manufacture of microwave popcorn, and specifically the butter
27 flavorings that would eliminate or decrease the risk to users and

- 1 consumers such as Plaintiffs from an inhalation hazard;
- 2 e. the duty to disclose to all foreseeable users and consumers the
- 3 results of their own scientific research and other scientific
- 4 research known to them indicating that the use of microwave
- 5 popcorn and butter flavorings and/or their constituents cause
- 6 serious risks of harm;
- 7 f. the duty to warn all foreseeable users and consumers of the
- 8 known dangers of microwave popcorn, butter flavorings and/or
- 9 their constituents;
- 10 g. the continuing duty to warn all foreseeable users and consumers
- 11 of their microwave popcorn and butter flavoring products
- 12 concerning defects of which the Defendants acquired knowledge
- 13 after the product was manufactured or sold;
- 14 h. the duty to provide the post-marketing warning or instruction that
- 15 a manufacturer and/or seller exercising reasonable care would
- 16 have provided concerning the risk, in light of the likelihood that
- 17 the products would cause consumers such as Plaintiffs injuries
- 18 and in light of the likely seriousness of these injuries; and
- 19 i. the duty to exercise due care and the ordinary, reasonable and
- 20 technical skill and competence that is required of designers,
- 21 manufacturers, processors, distributors, marketers, sellers,
- 22 suppliers, and others in a similar situation, including, without
- 23 limitation: the duty to test their food products and food flavors
- 24 and ingredients, the duty to acquire and maintain the knowledge
- 25 of an expert to design, manufacture, process, distribute, market,
- 26 sell, and/or supply their products free from defects and/or latent
- 27 defects, and the duty to adequately warn of product defects and/or
- 28

1 hazards, which duty continued even after the sale of said
2 products.

3 34. Defendants were negligent and at fault in causing Plaintiff Larry
4 Newkirk's claimed injuries and damages with regard to the subject microwave
5 popcorn and/or butter flavoring by failing to design, manufacture and/or distribute a
6 reasonably safe product as described above.

7 35. Defendants' negligent conduct violated the provisions of RCW 7.72,
8 et seq.

9 36. As a direct and proximate result of Defendants' negligence, Plaintiff
10 Larry Newkirk has developed severe, permanent, and progressive damage to the
11 lungs, severe damage to the respiratory system and/or impairment of the ability to
12 function. Plaintiffs have suffered and continue to suffer damages including, but not
13 limited to, physical pain and suffering, loss of consortium, mental anguish and
14 emotional distress, loss of enjoyment of life, loss of ability to function as a whole
15 person, permanent impairment, disability and/or loss of sleep and natural rest. In
16 addition, Plaintiffs have suffered and will suffer lost wages, lost earning capacity and
17 future economic loss and have expended and will expend money for medical
18 treatment, medication, medical monitoring and/or medical devices and other out-of-
19 pocket expenses.

20 WHEREFORE, Plaintiffs demand judgment against Defendants, and each of
21 them, for compensatory damages together with interest, costs of suit, attorneys' fees
22 and all such other relief as the Court deems proper.

23 **COUNT II**

24 **(Strict Liability in Tort -- Design Defect)**

25 37. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-
26 36 as if fully set forth hereunder.

27 38. Defendants ConAgra and Shopko manufactured, sold and/or distributed
28

1 or otherwise placed into the stream of commerce microwave popcorn containing
2 butter flavoring products and other products containing diacetyl within the ordinary
3 course of their businesses.

4 39. Defendants Givaudan, Symrise, BBA, IFF and John Doe Defendants 1-
5 20 manufactured, sold and/or distributed or otherwise placed into the stream of
6 commerce butter flavoring products containing diacetyl within the ordinary course
7 of their businesses.

8 40. When Plaintiff Larry Newkirk was exposed to the Defendants' products:

9 a. said food and flavor products were more dangerous than an
10 ordinary consumer would expect when used in an intended or reasonably
11 foreseeable manner, and/or

12 b. the foreseeable risks associated with the design or formulation of
13 the food and flavor products exceeded the benefits associated with their design
14 or formulation, in that:

15 i. the nature and magnitude of the risks of harm associated
16 with the design or formulation of said products, in light of the intended
17 and reasonably foreseeable uses, modifications and alterations of said
18 products, outweighed the intended or actual utility of said designs and
19 formulations;

20 ii. consumers, including Plaintiff Larry Newkirk, would not
21 likely be aware, whether based on warnings, general knowledge or
22 otherwise of the risks of harm;

23 iii. it was likely that the design or formulation of the
24 Defendants' microwave popcorn containing natural and artificial butter
25 flavorings and other products containing diacetyl would cause harm in
26 light of their intended and reasonably foreseeable uses, modifications
27 and alterations;

1 iv. there was no performance or safety advantages associated
2 with the design or formulation of Defendants' products; and

3 v. Defendants possessed both the technical and economic
4 feasibility of using an alternative design or formulation when the
5 products left the control of Defendants.

6 41. Plaintiff Larry Newkirk used, smelled and inhaled the butter aroma and
7 vapors and also ate Defendants' food and flavor products in an intended and
8 reasonably foreseeable manner.

9 42. At the time of the design, development, manufacture, testing, packaging,
10 promotion, marketing, distribution, labeling and/or sale of the Defendants'
11 microwave popcorn and popcorn flavor products, said products were defective as
12 designed when put to the use anticipated by the Defendants as a result, among other
13 things, of their butter flavorings and other products containing diacetyl and other
14 compounds having the propensity to cause damage to the respiratory system in the
15 form of asthma, bronchiectasis, bronchiolitis obliterans, chronic bronchiolitis, chronic
16 obstructive bronchitis, chronic cough, chronic obstructive pulmonary disease,
17 emphysema, fatigue, obstructive spirometry abnormalities, severe lung impairment,
18 shortness of breath and other respiratory illnesses.

19 43. As a result of said Defendants' food and flavor products' propensity to
20 cause respiratory disease as described above, the Defendants' products were
21 unreasonably dangerous and defective when put to the intended and reasonably
22 foreseeable use anticipated by the Defendants.

23 44. Plaintiffs' harm was not caused by an inherent characteristic of
24 Defendants' products which is a generic aspect of their products that cannot be
25 eliminated without substantially compromising the products' usefulness or
26 desirability and which is recognized by the ordinary person with the ordinary
27 knowledge common to the community.

1 45. A practical and technically feasible alternative design or formulation was
2 available for Defendants' products that would have prevented the harm to Plaintiffs
3 without substantially impairing the usefulness or intended purpose of Defendants'
4 products.

5 46. Defendants are strictly liable to Plaintiff Larry Newkirk for his claimed
6 injuries and damages with regard to the subject microwave popcorn and/or butter
7 flavoring because the product was not reasonably safe as described above.

8 47. Defendants are strictly liable to Plaintiff Larry Newkirk for plaintiff's
9 injuries and damages pursuant to RCW 7.72, et seq.

10 48. As a direct and proximate result of the dangerous and defective condition
11 of the Defendants' products and the Defendants' failure to warn of the dangers
12 thereof, Plaintiff Larry Newkirk has developed severe, permanent, and progressive
13 damage to the lungs, severe damage to the respiratory system, and/or impairment of
14 the ability to function. Plaintiffs have suffered and continue to suffer damages
15 including, but not limited to, physical pain and suffering, loss of consortium, mental
16 anguish and emotional distress, loss of enjoyment of life, loss of ability to function
17 as a whole person, permanent impairment, disability and/or loss of sleep and natural
18 rest. In addition, Plaintiffs have suffered and will suffer lost wages, lost earning
19 capacity and future economic loss, and have expended and will expend money for
20 medical treatment, medication, medical monitoring and/or medical devices and other
21 out-of-pocket expenses.

22 WHEREFORE, Plaintiffs demand judgment against Defendants, and each of
23 them, for compensatory damages, together with interest, costs of suit, attorneys' fees
24 and all such other relief as the Court deems proper.

COUNT III

(Failure to Warn)

49. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-48 as if fully set forth hereunder.

50. The Defendants designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, supplied, and labeled/sold their microwave popcorn containing butter flavorings and/or the butter flavoring products without adequate instructions on their safe use to reduce and/or eliminate exposure thereto, and/or without warnings that the products contained substances that are dangerous to health and life and cause severe respiratory diseases.

51. Defendants knew or in the exercise of reasonable care should have known about the health risks associated with exposure to the butter flavoring products contained in microwave popcorn.

52. Defendants failed to provide the post-marketing warning or instruction that a manufacturer/supplier/distributor/seller exercising reasonable care would have provided concerning the risk, in light of the likelihood that the products would cause consumers, including Plaintiff Larry Newkirk, injuries and in light of the likely seriousness of these injuries.

53. The health risks associated with Defendants' microwave popcorn and food flavoring products were not open and obvious or of a type that is a matter of common knowledge.

54. As a result of said Defendants' failure to adequately instruct and warn of the dangerous characteristics of their products, said products were defective and unreasonably dangerous when put to the use reasonably anticipated by the Defendants.

55. As a direct and proximate result of the dangerous and defective condition of the Defendants' products and the Defendants' failure to warn of the dangers

1 thereof, Plaintiff Larry Newkirk has developed severe, permanent, and progressive
2 damage to the lungs, severe damage to the respiratory system, and/or impairment of
3 the ability to function. Plaintiffs have suffered and continue to suffer damages
4 including, but not limited to physical pain and suffering, loss of consortium, mental
5 anguish and emotional distress, loss of enjoyment of life, loss of ability to function
6 as a whole person, permanent impairment, disability and/or loss of sleep and natural
7 rest. In addition, Plaintiffs have suffered and will suffer lost wages, lost earning
8 capacity and future economic loss and have expended and will expend money for
9 medical treatment, medication, medical monitoring and/or medical devices and other
10 out-of-pocket expenses.

11 WHEREFORE, Plaintiffs demand judgment against Defendants, and each of
12 them, for compensatory damages, together with interest, costs of suit, attorneys' fees
13 and all such other relief as the Court deems proper.

14 **COUNT IV**

15 **(Violation of Washington Consumer Protection Act)**

16 **(RCW 19.86.010, et seq.)**

17 56. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-
18 55 as if fully set forth hereunder.

19 57. Defendants ConAgra, Shopko and John Doe Defendants 1-20 are
20 designers, manufacturers, promoters, marketers, developers, sellers and/or distributors
21 of microwave popcorn including specifically microwave popcorn sold under the
22 label/brand "Act II."

23 58. Defendants Givaudan, Symrise, IFF, BBA and John Doe Defendants 1-
24 20 are designers, manufacturers and/or sellers of butter flavoring created with the
25 intent that they be used in microwave popcorn sold for use by consumers such as
26 Plaintiffs.

27 59. Defendants ConAgra, Shopko and John Doe Defendants 1-20 knew or
28

1 should have known that microwave popcorn containing butter flavoring products,
2 including diacetyl, was unreasonably dangerous and defective and had a propensity
3 to cause serious and potentially life-threatening side effects. Notwithstanding the
4 foregoing, Defendants ConAgra, Shopko and John Doe Defendants 1-20 omitted
5 material facts concerning the use of and safety of microwave popcorn containing
6 butter flavoring in the statements made to consumers such as Plaintiff Larry Newkirk
7 and the general public.

8 60. Defendants Givaudan, Symrise, IFF, BBA and John Doe Defendants 1-
9 20 knew or should have known that microwave popcorn containing butter flavoring
10 products, including diacetyl, was unreasonably dangerous and defective and had a
11 propensity to cause serious and potentially life-threatening side effects.
12 Notwithstanding the foregoing, Defendants Givaudan, Symrise, IFF, BBA and John
13 Doe Defendants 1-20 omitted material facts concerning the use of and safety of
14 microwave popcorn containing butter flavoring in the statements made to consumers
15 such as Plaintiff Larry Newkirk and the general public.

16 61. Defendants' acts and representations described herein constitute unfair
17 and deceptive acts or practices in the conduct of trade or commerce which affect the
18 public interest within the meaning of the Washington Consumer Protection Act, RCW
19 19.86.090.

20 62. Defendants have violated the Washington Consumer Protection Act,
21 RCW 19.86.010, et seq. Defendants used deception, fraud, false promise,
22 misrepresentation and/or unfair practices in their packaging, labeling, distributing,
23 marketing, promoting and selling of microwave popcorn with butter flavoring in the
24 State of Washington.

25 63. Defendants' practices of promoting, marketing and labeling microwave
26 popcorn with butter flavoring and/or of marketing and labeling butter flavoring
27 created and/or reinforced a false impression as to its safety and placed all consumers
28

1 of such microwave popcorn at risk for serious injury and potentially death.
2 Defendants' statements and/or omissions were made with the intent that Plaintiff
3 Larry Newkirk would rely on such statements and/or omissions.

4 64. Plaintiffs purchased, prepared and consumed microwave popcorn
5 including specifically "Act II Butter" and "Act II Butter Lovers" microwave popcorn
6 for personal purposes and suffered an ascertainable loss of money as a result of
7 Defendants' use or employment of the unlawful methods, acts or practices described
8 and alleged herein.

9 65. As a direct and proximate result of Defendants' unlawful practices
10 alleged herein, Plaintiffs have suffered ascertainable loss, i.e., economic loss that
11 includes the purchase of the microwave popcorn despite it being unfit for use by a
12 consumer and additional out-of-pocket healthcare related costs, for which Defendants
13 are liable to Plaintiffs.

14 WHEREFORE, Plaintiffs demand judgment against Defendants, and each of
15 them, for compensatory damages, treble damages, statutory damages and fees,
16 together with interest, costs of suit, attorneys' fees and all such other relief as the
17 Court deems proper.

18 **COUNT V**

19 **Loss of Consortium and Claim for Medical Expenses**

20 **(Plaintiff Ruth Newkirk)**

21 66. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-
22 65 as if fully set forth hereunder.

23 67. As a direct result of the aforementioned conduct of Defendants more
24 fully described in Counts I, II, III and IV, Plaintiff Ruth Newkirk sustained loss of her
25 spouse's consortium, society, companionship, comfort, protection, care, attention,
26 advice and counsel, and guidance; loss of her spouse's financial support, loss of her
27 spouse's services and has incurred medical and medical monitoring expenses which

1 will continue to be incurred in the future.

2 WHEREFORE, Plaintiff Ruth Newkirk demands judgment against Defendants,
3 and each of them, for compensatory damages, together with interest, costs of suit,
4 attorneys' fees and all such other relief as the Court deems proper.

5 **Demand for Trial by Jury**

6 68. Plaintiffs demand a trial by jury on all issues in this matter.

7 **Prayer for Relief**

8 Plaintiffs request that the Court enter judgment against Defendants as follows:

- 9 1. Awarding Plaintiffs' special damages including, but not limited to, past
10 and future medical expenses, lost wages, lost earning capacity, future
11 economic loss, out-of-pocket expenses and other special damages, all in
12 amounts to be proven at the time of trial;
- 13 2. Awarding Plaintiffs general damages including, but not limited to, past
14 and future pain and suffering, mental anguish, emotional distress,
15 disability, permanent impairment, loss of enjoyment of life and other
16 general damages, all in amounts to be proven at the time of trial;
- 17 3. Awarding Plaintiff Ruth Newkirk for the loss of her spouse's
18 consortium, society, companionship, comfort, protection, care, attention,
19 advice, counsel and guidance, in an amount to be proven at the time of
20 trial;
- 21 4. Awarding prejudgment interest;
- 22 5. Awarding all remedies available under the Washington Consumer
23 Protection Act (RCW 19.86.010, et seq.);
- 24 6. Awarding Plaintiffs' statutory damages, costs, disbursements and
25 attorneys' fees incurred in this action; and
- 26 7. Awarding Plaintiffs' any additional or further relief which the Court
27 finds equitable, appropriate or just.

1 Dated: September 4, 2008

2
3 Respectfully Submitted,

4
5 s/Richard C. Eymann

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